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In the Supreme Court of the United States

OCTOBER TERM, 1978

SEYMOUR BRAVERMAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The memorandum opinion of the court of appeals (Pet. App. 1-2) is not reported.

JURISDICITON

The judgment of the court of appeals was entered on July 10, 1978. The petition for a writ of certiorari was filed on August 8, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the trial court committed reversible error in giving an *Allen* charge.

2. Whether the trial court's decision to restrict cross-examination of two government witnesses requires reversal of petitioner's conviction.

3. Whether the district judge committed reversible error in denying a motion for a new trial, where such motion was based on the ground that the government failed to disclose a grant of immunity to a government witness until after the jury began its deliberations.

4. Whether the trial court erred in not declaring a mistrial or striking allegedly prejudicial hearsay testimony.

5. Whether the trial judge improperly excluded from evidence an alleged "business record" proffered by the defense.

STATEMENT

Following two jury trials[1] in the United States District Court for the Central District of California, petitioner was convicted on one count of conspiring to make false statements and to defraud the United States Department

[1]On September 15, 1976, a 15 count indictment was filed against petitioner and four other defendants. Prior to the two trials in this case, two of the named co-conspirators, Stanley Oschin and his son Phillip Oschin, entered guilty pleas and testified for the government. Petitioner and defendant Morton L. Rubin were tried together, despite their objections and various motions to sever. On February 11, 1977, after a 12-day jury trial (1st trial), petitioner was convicted on count six and his accomplice, Rubin, was convicted on count seven, while both were acquitted on count fourteen. The jury was unable to reach a verdict as to the remaining counts: counts one, two, seven and eleven for petitioner; counts one, two and eleven for Rubin (R. 345). On May 31, 1977, after an eight-day jury trial (2d trial) on the remaining counts, petitioner was convicted on counts one, two, seven and eleven; Rubin was convicted on count one, acquitted as to count eleven, and count two was dismissed as to him prior to the retrial (R. 348).

of Housing and Urban Development ("HUD"), Federal Housing Administration ("FHA") in violation of 18 U.S.C. 371, and on four counts of aiding and abetting the making of false statements to HUD-FHA in connection with the acquisition of loan insurance, in violation of 18 U.S.C. 1010. The court of appeals affirmed petitioner's conviction and sentence (Pet. App. 1-2).[2]

In 1970, HUD greatly expanded its programs to revitalize deteriorating housing in the urban areas of the United States. Under these programs, housing developers were given financial incentives to purchase and rehabilitate existing structures primarily for habitation by lower income families. See 24 C.F.R. Parts 221, 235 and 236. Essentially, HUD would act as the project guarantor so that if the project fell into financial difficulties HUD would assume the mortgage and indemnify the lending institution financing the project (Tr. 408-418). In order to supervise these projects, HUD required the project sponsors and contractors to submit periodic cost certifications during the progress of the rehabilitation program. See, *e.g.*, 24 C.F.R. 221.550a-221.553. If these certifications were approved by HUD, the lending institution would be authorized to disburse further guaranteed progress payments to the contractor so that the architect, subcontractors, and laborers could be paid and the projects completed (Tr. 422-426).

Since petitioner does not challenge the sufficiency of the evidence supporting his conviction, the testimony may be summarized briefly. From 1971 through 1974,

[2]Petitioner was sentenced to nine months' imprisonment on the conspiracy count. The district judge suspended sentence on the other counts, imposing a five-year period of probation on petitioner, to be served consecutively to the prison term, with a condition that petitioner render at least 200 hours of voluntary community service. Finally, petitioner was fined a total of $10,000.

petitioner and his associates, jointly doing business as Subsidized Housing Corporation of America ("SHCA"), contracted with HUD to perform rehabilitation construction work in connection with four HUD sponsored multiple-dwelling projects (Tr. 1352-1395, 1732-1733). During the course of the projects, petitioner and his co-conspirators submitted signed certificates to HUD, which purported to reflect the actual costs incurred during the rehabilitation construction phases of the housing projects. In fact, however, the costs submitted grossly overstated SHCA's expenses. Substantial portions of the monies paid to the architect, subcontractors, and laborers on SHCA projects were kicked back to petitioner and his co-conspirators (Tr. 1060-1063, 1071-1095, 1001-1018, 1132-1139, 1194-1232, 1236-1239, 1721-1722, 1737-1743, 1747).

Thus, co-conspirator Stanley Oschin, who pleaded guilty to two false statement counts and thereafter testified for the government (Tr. 1350-1352), thoroughly implicated petitioner in the planning and operation of the kickback scheme. Oschin was SHCA's construction supervisor and a partner of petitioner's (Tr. 1354-1366). He described how the partnership misleadingly issued payroll checks to laborers in amounts reflecting union scale wages, cashed the checks for the laborers, and, as part of the laborers' condition of employment, received back a significant percentage of the check amounts in cash. These kickbacks were then distributed to the three partners, including petitioner (Tr. 1366-1369, 1373-1378). Similarly, petitioner and his partners arranged a kickback scheme with the projects' architect (Tr. 1382-1386) and with certain subcontractors who would, after successfully bidding for an SHCA contract, enter into a much higher contract, just below the maximum allowed by HUD regulations. The difference between the actual bid and the cost certificate forwarded to HUD would then be split

between the subcontractors and the co-conspirators (Tr. 1378-1382), although some of the subcontractors claimed never to have received their share (Tr. 1063, 1072). As a result of these machinations, the HUD cost certificates, which were signed and/or submitted by petitioner and his partners, were falsely inflated (Tr. 1392-1422). Oschin's testimony was corroborated and supplemented by numerous witnesses, including many of those who had been forced to kick back either their wages or contract payments (*e.g.*, Tr. 1194-1232, 1236-1239, 1001-1018, 1060-1063, 1071-1095, 1132-1139, 1721-1722, 1737-1743, 1747).

ARGUMENT

1. Petitioner contends (Pet. 14-19) that the use of a modified *Allen* charge[3] at each of his two trials below (Tr. 89-96, 104-112; see note 1, *supra*) denied him due process of law. However, petitioner was not denied a fair trial, since the challenged supplemental instructions were scrupulously fair and were given only after the jury *sua sponte* reported a deadlock despite lengthy deliberations.[4] See, *e.g.*, *United States* v. *Robinson*, 560 F. 2d 507, 517 (2d Cir. 1977) (*en banc*), cert. denied, 434 U.S. 1050 (1978); *United States* v. *Bailey*, 480 F. 2d 518 (5th Cir. 1973) (*en banc*).

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[3]See *Allen* v. *United States*, 164 U.S. 492 (1896).

[4]The charges were given following three and two days of jury deliberations, respectively (R. 344-345, 347-348). Since the jury had expressly stated that it was deadlocked after such substantial attempts to reach unanimity, there is no merit to petitioner's claim (Pet. 16) that the *Allen* type charges were given prematurely. See, *e.g.*, *United States* v. *Seawell*, 550 F. 2d 1159, 1162 n.6 (9th Cir. 1977) (citing cases).

The charges, which were identical, encouraged the jurors to reach a verdict, but only "if you can do so without violence to individual judgment" (Tr. 93, 95, 109, 111). Similarly, the court instructed the jurors that "you should not surrender your honest convictions * * *" (Tr. 93, 109) and that "no juror is expected to yield a conscientious conviction * * *" (Tr. 94, 111). Nor was the charge unbalanced. Indeed, the court seemingly favored petitioner by stating:

> If *much the greater number of you are for a conviction*, each dissenting juror ought to consider whether a doubt in his or her own mind is a reasonable one * * *.
>
> On the other hand, if *a majority or even a lesser number of you are for acquittal*, other jurors ought seriously to ask themselves again, and most thoughtfully, whether they do not have reason to doubt the correctness of a judgment which is not concurred in by many of their fellow jurors * * *.

(Tr. 93-94, 110) (emphasis supplied). Moreover, the judge repeatedly reminded the jurors that the government had to establish petitioner's guilt beyond a reasonable doubt (Tr. 94, 95, 110, 111). Finally, it should be noted that at both trials the jurors continued to deliberate after hearing the *Allen* charge and ultimately convicted petitioner and his co-defendant of some charges and not others. In sum, there is no merit to petitioner's claim that his conviction was coerced by the modified *Allen* charge given here.

Petitioner notes (Pet. 14-15) that there is an apparent conflict among the courts of appeals concerning the traditional *Allen* charge. Four courts of appeals, in the exercise of their supervisory powers, have directed that the *Allen* charge not be given except in a substantially modified form. See *United States* v. *Angiulo*, 485 F. 2d 37

(1st Cir. 1973); *United States* v. *Thomas*, 449 F. 2d 1177 (D.C. Cir. 1971); *Government of the Virgin Islands* v. *Hernandez*, 476 F. 2d 791 (3d Cir. 1973); *United States* v. *Chaney*, 559 F. 2d 1094 (7th Cir. 1977). While the modified charge given here arguably does not comport with the supervisory standards enunciated in those circuits, the Ninth Circuit continues to approve the more traditional *Allen* type charge. See, *e.g.*, *United States* v. *Seawell*, 550 F. 2d 1159 (9th Cir. 1977). More importantly, no court of appeals has held that the *Allen* charge in its traditional form violates any constitutional right. And all the courts of appeals have agreed that some form of supplemental instruction may appropriately be given to a jury experiencing difficulty in reaching a unanimous verdict.

The differences among the courts of appeals reflect an ongoing reexamination of the precise wording of a proper supplemental instruction and do not warrant review by this Court. Indeed, the Court has recently denied certiorari in several other cases presenting a similar issue. *E.g.*, *Carter* v. *United States*, cert. denied, No. 77-1326 (June 12, 1978); *Dyba* v. *United States*, cert. denied, 434 U.S. 830 (1977); *Perez-Vega* v. *United States*, cert. denied, 424 U.S. 970 (1976); *Lee* v. *United States*, cert. denied, 422 U.S. 1044 (1975).

2. Petitioner further contends (Pet. 19-20) that the trial court unconstitutionally restricted his right to cross-examine certain witnesses. These alleged Sixth Amendment violations arose in connection with petitioner's attempted cross-examination of co-conspirator Stanley Oschin and his direct examination of his own witness, FBI Agent Santala (Tr. 1908, 36).

As regards the latter, the court, after listening to counsel's arguments, ruled that defense counsel could not ask Agent Santala the following question (Tr. 58):

> Now, did you investigate and prepare this case with the same degree of care, thoroughness and impartiality as you prepared the memorandum of interview with Mr. Braverman that you were just reading from?

Even assuming that the Sixth Amendment right of confrontation applies equally to a defendant's own witness, there is no merit to petitioner's claim.

The rejected question was repetitive, argumentative and irrelevant. Defense counsel had already succeeded in effectively attacking the reliability of both Agent Santala and his report. Thus, Santala had admitted that he relied on his report as past recollection recorded, that the report was prepared from notes that were not extensive, that "mistakes do crop up in those kinds of interviews," and that petitioner had denied the accuracy of the report when confronted with it at a subsequent interview (Tr. 1908-1929, 36-63). Similarly, defense counsel was able to elicit the agent's failure to interview properly and his ignorance of certain seemingly important facts in preparing his case report (Tr. 1914, 1921-1923, 49, 59-61). The jury was therefore fully able to evaluate Santala's thoroughness as it bore on the reliability of his testimony. Moreover, whether Santala was careful in preparing this case was irrelevant, since petitioner was to be judged on the evidence adduced at trial—not Santala's performance in the field. In these circumstances, the trial court properly exercised its broad discretion to preclude petitioner's "repetitive and unduly harassing interrogation" of Santala. See *Davis* v. *Alaska*, 415 U.S. 308, 316 (1974).

Nor is there any merit to petitioner's claim concerning the cross-examination of government witness Stanley Oschin. Defense counsel asked Oschin whether he understood "that by invoking the Fifth Amendment you have perhaps minimized the extent and value and quality

of your testimony to the United States?" Before the prosecution could object, Oschin answered "I wouldn't know" (Tr. 21). Since this answer was never struck from the record, any error in the judge's subsequent decision to sustain an exception to this question was without prejudice to petitioner. Moreover, the trial court's ruling was a correct exercise of its broad discretion to control cross-examination. See *Davis* v. *Alaska, supra*. The question was patently irrelevant and also repetitive, since prior cross-examination had already fully established Oschin's plea bargain with the government, his involvement in the kickback scheme and his failure to report the income generated by the illicit kickbacks on his tax returns (see, *e.g.*, Tr. 1459-1477, 1540-1548, 19-25; see generally Tr. 1459-1659).

3. Next, petitioner claims (Pet. 20-21) that he was denied a fair trial by the government's failure to disclose a grant of immunity to one of its witnesses until the jury began deliberations in his first trial. However, since the undisclosed grant of immunity, which involved Irving Rubin, brother of petitioner's co-defendant, was not material within the meaning of *United States* v. *Agurs*, 427 U.S. 97 (1976), petitioner is not entitled to a new trial.[5]

In *United States* v. *Agurs, supra*, this Court established that where a defendant did not make a specific *Brady* request, innocent government nondisclosure of exculpatory evidence would result in conviction reversal

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[5]We note that the *Brady* question (*Brady* v. *Maryland*, 373 U.S. 83 (1963)) might not even be reached here, since defendant Rubin was most likely aware of the immunity status of his brother, whose testimony belied his true allegiance. Actual possession of that information would preclude any *Brady* relief. See *United States* v. *Brown*, 562 F. 2d 1144, 1151 (9th Cir. 1977).

only when the nondisclosure could be described as "material." *Id.* at 108-113. Materiality was further defined in terms of the

> overriding concern with the justice of the finding of guilt. Such a finding is permissible only if supported by evidence establishing guilt beyond a reasonable doubt. It necessarily follows that if the omitted evidence creates a reasonable doubt that did not otherwise exist, constitutional error has been committed. This means that the omission must be evaluated in the context of the entire record.

Id. at 112 (footnote omitted).

Application of the *Agurs* standard of materiality to the record as a whole reveals that petitioner's claim is without merit. Rubin, while technically a government witness, testified as evasively as possible in an obvious effort to support the defendants' joint claims of innocence. Thus, Rubin testified that while he frequently talked with his brother about business, they never discussed kickbacks (Tr. 1705-1707, 1714-1715). Simultaneously, consistent with the defendants' stratagem of painting themselves as the innocent dupes of their partner, Rubin pictured Oschin as the real culprit (Tr. 1708).

Given the exculpatory nature of Rubin's testimony, petitioner undoubtedly would not have attempted to impeach him by showing that Rubin had sought immunity concerning his knowledge of, and involvement with, his brother's supposedly legal activities. Indeed, petitioner made no effort to reopen the evidence or stipulate the fact of immunity to the jury at the time he learned of its existence. Moreover, at his second trial, not only did petitioner not impeach Rubin with regard to his immunity, but also the defense objected to this information being elicited by the government on redirect examination (Tr. 17-28 to 17-30). Since petitioner chose as

a matter of trial tactics to consider the grant of immunity as immaterial—indeed inculpatory—he cannot now complain that the government committed a material *Brady* violation. In sum, "the omitted evidence [does not] create a reasonable doubt [of petitioner's guilt] * * *." *Agurs, supra*, 427 U.S. at 112.

4. Petitioner further argues (Pet. 21-22) that the trial judge should have either struck allegedly prejudicial hearsay from the record or declared a mistrial. During the course of cross-examination, a defense witness testified that she overheard a conversation between Oschin and an attorney which may have implicated petitioner as well as Oschin in the kickback scheme (Tr. 31-22 to 31-23).[6] Assuming, arguendo, that the challenged testimony was inadmissible hearsay,[7] petitioner waived his right to relief by failing timely to object. Fed. R. Evid. 103(a)(1).[8]

The witness testified without objection at approximately eleven o'clock on the morning of May 25, 1977 (Tr. 35). At a hearing on a motion to strike orally raised

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[6]The witness stated that the attorney had told Oschin "[y]ou know the FBI's going to be in on it and *you'll all go to jail*" (Tr. 31-22) (emphasis added). "You all" did not necessarily include petitioner.

[7]It is arguable that this conversation occurred as part of the partnership's attempt to hide its misdeeds. If that were the case, the testimony might well be proper as an adoptive admission in furtherance of the conspiracy. See Fed. R. Evid. 801(d)(2)(B) and (E).

[8]Rule 103(a) provides in relevant part:

> (a) Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and
>
> (1) In case the ruling is one admitting evidence, *a timely objection or motion to strike appears of record*, stating the specific ground of objection, if the specific ground was not apparent from the context * * *. [Emphasis supplied].

some two and a half hours later, defense counsel stated that "[f]or tactical reasons we did not object to it when it came in" (Tr. 32). Instead, defense counsel "went back and took [the witness] on redirect and attempted to make whatever use he could of the situation" (Tr. 33). Since petitioner knowingly and intentionally waived his right to object, the trial court correctly denied petitioner's motion as untimely. *United States* v. *Rose*, 525 F. 2d 1026 (2d Cir. 1975), cert. denied, 424 U.S. 956 (1976); *Jenkins* v. *General Motors Corp.*, 446 F. 2d 377, 382-383 (5th Cir. 1971), cert. denied, 405 U.S. 922 (1972); *United States* v. *Wolff*, 409 F. 2d 413, 416 (7th Cir.), cert. denied, 396 U.S. 858 (1969); Fed. R. Evid. 103(a)(1). Furthermore, in light of the ambiguous nature of the reported conversation, its admission constituted harmless error.

5. Finally, petitioner challenges (Pet. 22-23) the district court's ruling that one of his exhibits was inadmissible hearsay evidence. The rejected document was a memorandum prepared by an outside investigator for petitioner in response to HUD's investigation of petitioner's corporation (Tr. 1982-1983). Such a statement was not regularly kept in the ordinary course of business, but rather constituted a document specially prepared for litigation purposes. Therefore, the trial judge correctly concluded that the proffered exhibit was not admissible as a business document under Fed. R. Evid. 803(6). See *Palmer* v. *Hoffman*, 318 U.S. 109, 111-114 (1943); *Hartzog* v. *United States*, 217 F. 2d 706 (4th Cir. 1954) (worksheets made in preparation for future income tax prosecution not admissible as business document) (cited with approval by Notes of Advisory Committee on Proposed Rules, Note to Paragraph 803(6)). In any event, the exhibit's exclusion was harmless error since the information contained therein was substantially elicited from the investigator (Tr. 1988) and other witnesses (*e.g.*, Tr. 875-877).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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